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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 163

EAU CLAIRE NATIONAL BANK,

Plaintiff in Error.

vs.

RALPH W. JACKMAN, TRUSTEE OF THE ESTATE OF JOHN H. YOUNG, BANKRUPT,

Defendant in Error.

In Error to the Supreme Court of the State of Wisconsin

Brief and Argument of Defendant in Error

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(ON MOTION TO DISMISS WRIT.)

NATURE OF ACTION.

This was an action brought by defendant in error against the plaintiff in error to recover the value of property transferred by the bankrupt to plaintiff in error, within four months of filing his voluntary petition in bankruptcy, for the purpose of giving it a preference over other creditors, and which was received by it, with knowledge that such transfer was made for the express purpose of giving it such preference.

HISTORY OF ACTION.

This action was commenced by the trustee in the circuit court of Eau Claire County, prior to the amendment of February 5th, 1903, giving federal courts jurisdiction of such actions, and resulted in a judgment in favor of the trustee and against the bank for $6,843.77, damages and costs. On appeal to the Supreme Court of the State of Wisconsin, this judgment was affirmed. This writ of error is brought to reverse such judgment of the Supreme Court of the State of Wisconsin.

STATE OF RECORD.

The record before this court, consisting of the pleadings, bill of exceptions and mandate of the Supreme Court of the State of Wisconsin, fails to show that any federal question was raised or decided by the Wisconsin courts, and that the whole matter was litigated purely as a question of fact.

COMPLAINT.

The complaint of the trustee alleged in substance, his appointment and qualification; that the bankrupt, within four months immediately preceding the filing of his petition in bankruptcy, and while he was hopelessly insolvent, as defendant well knew, transferred substantially all of his property to defendant, for the express purpose of giving it a preference, and that at the time of receiving such property, the plaintiff in error had reasonable cause to believe that it was made for the purpose of giving it such preference; that after transferring such property by way of mortgage, the plaintiff in error as a means of forclosing directed the bankrupt to convey the same by bill of sale to the Waters-Clark Lumber Company, and that such bill of sale was made pursuant to the direction of the plaintiff in error, and that Waters-Clark Lumber Company by agreement, paid the consideration or part of it to plaintiff in error; that by reason of such collusive arrangement and agreement aforesaid, and by means of said chattel mortgages and bills of sale, the defendant bank, within four months prior to filing the petition, appropriated to the payment of its indebtedness, substantially

all of the property of the bankrupt; that there was no other property in the possession of the plaintiff as trustee out of which the other creditors of the bankrupt could be paid, and that it was necessary to enable defendant in error to pay anything to the other creditors, to recover from said defendant bank the value of the property so by it appropriated by means of such transfer. (pp. 9-12 Record.)

ANSWER.

The answer of defendant, after admitting the bankruptcy proceedings, the appointment and qualification of the trustee, the execution of the mortagages in question, and that a portion of the proceeds of the mortgaged property was paid to the defendant bank, alleges: "that said mortgages were given for a good and valuable consideration, and that neither said mortgages nor the payments made to the defendant aforesaid, were made, given or received for the purpose of giving the defendant a preference over other creditors of said Young, *contrary to the provisions of the bankruptcy law.*" (p. 15 Record.)

This allegation that the transfer of a portion of the property of an insolvent debtor to one who knew of his insolvency, was not for the purpose of giving the transferee a preference, *contrary to the provisions of the bankruptcy law*, is the only reference found in the pleadings to such law, and seems to be the basis of the claim now made that the plaintiff in error specially set up and claimed the bankruptcy statute as a defense.

VERDICT.

In the trial court the issues were submitted to a jury by way of a special verdict, and the jury found that at the time of making the chattel mortgages, and at the time of giving the bill of sale, the property of the bankrupt at a fair valuation was not sufficient in amount to pay his debts; that at the time of accepting the chattel mortgages and at the time of causing the lumber and logs to be transferred to the Waters-Clark Company, the plaintiff in error and its officers had reasonable cause to believe that the bankrupt intended by such transfers to give it a preference.

By stipulation the trial judge found the value of the prop-

erty transferred, which value was made the basis of judgment. (pp. 17-18 record.)

JUDGMENT.

On this verdict the trial court entered judgment in favor of the trustee, for the net amount realized by the plaintiff in error from the proceeds of the logs and lumber in question, after paying time orders or time checks for amounts due to laborers, which under the Wisconsin statute might or would have become liens by filing proper petition, the plaintiff in error holding most of the time checks. (p. 18 record.)

BILL OF EXCEPTIONS.

Prior to the trial plaintiff in error demurred to the complaint on four grounds, none of which even suggest a federal question; namely, lack of jurisdiction of the state court, want of legal capacity in the plaintiff to sue, defect of parties plaintiff, and that said complaint does not state facts sufficient to constitute a cause of action. (p. 20 record.) This demurrer having been overruled, the parties went to trial and litigated the facts submitted to the jury by special verdict. No motion or objection was made during the trial, which raised any federal question. At the conclusion of plaintiff's evidence, the plaintiff in error moved for a non-suit, without specifying any grounds therefor. (p. 252 record.) On the trial the plaintiff in error made nine requests to the court to charge the jury, none of which suggested a federal question, (pp. 256-258 record) and each of which related solely to some of the questions of fact which the court was about to submit to the jury. After verdict, plaintiff in error filed exceptions to the charge of the trial court, none of which suggested a federal question. (264-265 record.)

The defendant also, after verdict, moved the court to amend the special verdict as rendered by the jury, and for judgment on the verdict, as amended, all without suggesting a federal question. (p. 266 record.) The trustee also moved for judgment upon the special verdict, and both motions coming on to be heard, the trial court filed an opinion on the questions presented to it, none of which were of a federal nature. (p. 267-274 record.)

After verdict, and before the entry of judgment, plaintiff in error moved the court to set aside the verdict and for a new trial, specifically stating the grounds, none of which were based on any right, privilege or immunity claimed under a federal statute or law. (p. 276 record.) This bill of exceptions contains all of the evidence taken on the trial of said action, and all the rulings, proceedings, decisions and exceptions made and taken therein, as appears by the certificate of the trial judge. (p. 294 record.)

RECORD IN SUPREME COURT.

Thereupon plantiff in error took an appeal to the Supreme Court of the State of Wisconsin, from the judgment entered on said verdict, which judgment was affirmed (p. 296 record), and in the opinion the several errors assigned and urged in that court by the plaintiff in error are considered and disposed of, none of them raising a federal question. (See opinion, pp. 302 to 311 record.)

Thereupon plaintiff in error moved for a rehearing in the Supreme Court, without specifying any federal question involved (p. 311) which motion was denied. (p. 314 record.)

PROCEEDINGS IN THIS COURT.

Plaintiff in error having filed in the Supreme Court of Wisconsin, a petition for a writ of error to this court, the record as it then existed was returned, under the seal of the clerk of that court, on the 28th day of November, 1905. On February 3rd, 1906, defendant in error moved to dismiss the writ for want of jurisdiction in this court. (See notice of motion on file.) Thereafter, and on March 7, 1906, Hon. John B. Cassoday, chief justice of the Supreme Court of Wisconsin, signed a certificate, which was returned to this court as a supplemental return on March 12th, 1906. (p. 315 record.)

AUTHORITIES ON MOTION.

This court has no jurisdiction to review the judgment of the Supreme Court of the State of Wisconsin, mentioned in the writ.

Sec. 709 R. S. of U. S.

Section 709 of the Revised Statues of the United States

provides: "A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed, by either party, under such constitution, treaty, statute, commission or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States:

The Supreme Court may reverse, modify or affirm the judgment or decree of such state court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

To give the supreme court jurisdiction it must appear by the record that a federal question was involved.

Zadig vs. Baldwin 166 U. S. 485.

Citizens' Bank vs. Owensboro 173 U. S. 636.

Dewey vs. Des Moines 173 U. S. 193, 198.

Oxley Stave Company vs. Butler County 166 U. S. 648, 654.

Ocean Insurance Company vs. Polleys 13 Pet. 157.

In Oxley Stave Co. vs. Butler County, supra, the court said that the words "specially set up or claimed" in section 709 of the Revised statutes "were inserted in order that the revisory power of the supreme court should not extend to rights denied by the final judgment of the highest court of a state unless the party claiming such rights plainly and distinctly in-

dicated, before the state court disposed of the case, that they were claimed under the constitution, treaties or statutes of the United States. The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights, the constitution of the United States or some treaty, statute commission or authority of the United States he must so declare: and unless he does so declare 'specially,' that is, unmistakably this court is without authority to reexamine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a federal right is left to mere inference. * *Upon like grounds the jurisdiction of this court to reexamine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right." The writ of error was dismissed.

In Dewey vs. Des Moines, supra, the court said: "Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. *It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law.*"

In the case of Ocean Insurance Company vs. Polleys, supra, the court held that in determining whether the record shows a case for the exercise by the Supreme Court of the United States of its appellate jurisdiction over state courts, that court is not at liberty to resort to forced inferences and conjectural reasonings, or possible, or even probable, suppositions of the points raised in and decided by the state courts.

In order to bring a case from the state court to the Uni-

ted States Supreme Court for review, it is necessary that the record should show that the point giving jurisdiction was raised and decided in the court below.

11 Cyc. 937 and cases cited.

Detroit City Railway Co. vs. Guthard, 114 U. S. 133.

Bollin vs. Nebraska, 176 U. S. 83, 91.

Locber vs. Schroeder, 149 U. S. 580.

Miller vs. Texas, 153 U. S. 535.

Choteau vs. Gibson, 111 U. S. 200.

Hagar vs. California, 154 U. S. 639.

In Choteau vs. Gibson, supra, the court said: "From the the beginning it has been held that, to give us jurisdiction in this class of cases, it must appear affirmatively on the face of the record, not only that a federal question was raised and presented to the highest court of the state for decision, but that it was decided or that its decision was necessary to the judgment or decree rendered in the case."

In Detroit City Railway Co. vs. Guthard, supra, the court said:"the reason of the rule is obvious. Our jurisdiction for the review of a judgment of the highest court of a state depends on the decision by that court of one or more of the questions specified in section 709 Revised Statutes and in the way there mentioned. If there has been no such decision in the suit there can be no reexamination of the judgment here. It is what was actually decided that we are to consider, not what might have been decided; and, as our jurisdiction must appear affirmatively on the face of the record before we can proceed, the record must show either in express terms or by fair implication, not only the question but its decision. It is not enough to find by searching after judgment, that the requisite question might have been raised and presented for decision. It must appear that it was actually raised and actually decided." Motion to dismiss was granted.

In Hagar vs. California, supra, the court held that error will not lie to a state court unless a federal question was actually raised and decided or necessarily involved in the judgment. It is not enough that a federal question might have been raised.

The record must show the fact that the question was raised or claim made in the state court and was passed upon adversely to plaintiff in error.

Roby vs. Colehour, 146 U. S. 153, 159.

Capital National Bank vs. Cadiz First National Bank 172 U. S. 425.

Green Bay Canal Co. vs. Patten Paper Company, 172 U. S. 58.

Dewey vs. Des Moines, 173 U. S. 193.

In Roby vs. Colehour, supra, the court said, "Our jurisdiction being invoked upon the ground that a right or immunity, specially set up and claimed under the Constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, or that such was the necessary effect in law of the judgment."

In Capital Bank vs. Cadiz Bank, supra, the court said, "If a denial by the state court of a right under a statute of the United States is relied on as justifying our interposition, before it can be held that the state court thus disposed of a federal question, the record must show, either by the words used or by clear and necessary intendment therefrom, that the right was specially claimed; or a definite issue as to the possession of the right must be distinctly deducible from the record, without an adverse decision of which, the judgment could not have been rendered."

A certificate of the chief justice of the highest court of the state that a federal question was raised and determined is not properly a part of the record.

11 Cyc. 939 and cases cited.

Powell vs. Brunswick County, 150 U. S. 433.

Sayward vs. Denny, 158 U. S. 180.

Henkel vs. Cincinnatti, 177 U. S. 170.

Home for Incurables vs. New York, 187 U. S. 155.

Winous Point Shooting Club vs. Caspersen, 193 U. S. 189.

Fullerton vs. Texas, 196 U. S. 192.

Allen vs. Arguimbau, 198 U. S. 149.
Marvin vs. Trout, 199 U. S. 212.
Rector vs. City Deposit Bank, 200 U. S. 405.

In Powell vs. Brunswick County, supra, the court said, "The determination of the jurisdiction of this court to review the judgment of a state court under section 709 of the revised statutes necessarily devolves upon the court itself, and, while the certificate of the presiding judge of the state court as to the existence of the state of case upon which our interposition may be successfully invoked is always regarded with respect, it cannot confer jurisdiction upon this court to reexamine the judgment below.

In Home for Incurables vs. New York, supra, the court said, "It is true that the transcript contains the certificate of the chief judge of the court of appeals of New York, not appearing to have been by order of that court while the case was before it or under its control, which states that the Home did make, in that court, the federal questions now pressed for our consideration. But this certificate is not properly a part of the record. While we have said in some cases that such a certificate is entitled to great respect, and, in other cases, that its office is to make that more certain and specific which is too general and indefinite in the record, it is insufficient in itself to give us jurisdiction, or to authorize us to determine federal questions that do not appear, in any form, from the record, to have been brought to the attention of the state court."

In Marvin vs. Trout, supra, the court said, "It is well settled, in this court, that a certificate from a presiding judge of the state court, made after the decision of the case in that court, to the effect that a federal question was considered and decided by the court adversely to the plaintiff in error, cannot confer jurisdiction on this court, where the record does not otherwise show it to exist; that the effect of such a certificate is to make more certain and specific what is too general and indefinite in the record itself, but it is incompetent to originate the federal question."

A petition for rehearing addressed to a state court forms no part of the record and cannot be looked into for the purpose of determining whether a federal question was raised and decided by the state court.

Lagrange vs. Choteau, 4 Pet. 287.

Susquehanna Boom Co. vs. West Branch Boom Co., 110 U. S. 57.

Simmerman vs. Nebraska, 116 U. S. 54.

Harding vs. Illinois, 196 U. S. 78.

In Susquehanna Boom Co. vs. West Branch Boom Co., supra, the court said, "We act on the case as made to the court below when the judgment was rendered, and cannot incorporate into the record any new matter which appears for the first time after the judgment, on a petition for rehearing. Such a petition is no part of the record on which the judgment rests."

The petition for the allowance of a writ of error from the Supreme Court of the United States to a state court, forms no part of the record for the purpose of determining whether the former court has jurisdiction to review the judgment.

11 Cyc. 938 .

California Powder Works vs. Davis, 151 U. S. 389.

Sayward vs. Denny, 158 U. S. 180.

Warfield vs. Chaffe, 91 U. S. 690.

Clark vs. Pennsylvania, 128 U. S. 395.

Butler vs. Gage, 138 U. S. 52.

Corkran Oil Company vs. Arnandet, 199 U. S. 182.

In Warfield vs. Chaffe, supra, the court said, "The record sent here from the Supreme Court does not disclose any such claim. The petition for the allowance of the writ in this court is not part of the record of the court below. We act only upon that record; and that does not show that any federal question was either presented by the pleadings or upon the trial in the district court, or decided by the supreme court."

In Clark vs. Pennsylvania, supra, the Court said, "We act

only upon the record of the court below, and of that record, the petitions for the writs of error form no part."

If the record fails to show that a federal question has been raised an assignment of errors cannot be availed of to import such a question into the cause.

11 Cyc. 938 and cases cited.

Fowler vs. Lamson, 164 U. S. 252.

Harding vs. Illinois, 196 U. S. 78.

Cornell vs. Green, 163 U. S. 75.

Missouri Pac. Ry. Co. vs. Fitzgerald, 160 U. S. 556, 575.

Corkran Oil Company vs. Arnandet, 199 U. S. 182.

In Missouri Pacific Railway Company vs. Fitzgerald, supra, the court said, "An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised and passed on in the court below, but we may refer to such assignment by way of convenience to ascertain the contentions of the plaintiff in error."

In Cornell vs. Green, supra, the court held that an assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and the rulings asked thereon, so as to give jurisdiction to this court.

The federal question where not presented prior to the decision by the court of last resort of the state comes too late.

Bollin vs. Nebraska, 176 U. S. 83.

Citizens' Savings Bank vs. Owensboro, 173 U. S. 636.

Duncan vs. Missouri, 152 U. S. 377.

In Duncan vs. Missouri, supra, the court said, "To give jurisdiction to this court, the title, right, privilege or immunity relied on must be specially set up or claimed at the proper time and in the proper way, and the decision must be against it; whereas, in this case, the question was not suggested until after judgment, and after the application for rehearing had been overruled, and only then in the form of a motion to transfer the case."

In Bollin vs. Nebraska, supra, the court said, "We have repeatedly decided that an appeal to the jurisdiction of this court must not be a mere afterthought, and that if any right, privilege or immunity is asserted under the constitution or laws of the United States it must be specially set up and claimed before the final adjudication of the case in the court from which the appeal is sought to be maintained."

The federal title, right, privilege or immunity must be set up or claimed in the trial court, whenever, under the state practice, the highest state court in reviewing the judgment of the trial court, refuses to consider questions not therein raised.

Layton vs. Missouri, 187 U. S. 359.

Jacobi vs. Alabama, 187 U. S. 133.

Baldwin vs. Kansas, 129 U. S. 52.

Spies vs. Illinois, 123 U. S. 131.

Mutual Life Insurance Company vs. McGrew, 188 U. S. 309.

In Spies vs. Illinois, supra, the court said, "To give us jurisdiction under section 709 of the revised statutes because of a denial by a state court of any title, right, privilege or immunity claimed under the constitution or any treaty or statute of the United States, it must appear on the record that such, title, right, privilege or immunity was specially set up or claimed at the proper time in the proper way. To be reviewable here the decision must be against the right so set up or claimed. As the supreme court of the state was reviewing the decision of the trial court it must appear that the claim was made in that court, because the supreme court was only authorized to review the judgment for errors committed there and we can do no more."

In McGrew vs. Insurance Company, supra, the court said, "The proper way to raise the question or make the claim is by pleading, motion, exception or other action, part, or being made part, of the record showing that the claim was presented to the court."

The appellate jurisdiction of the supreme court of Wisconsin extends only to the revision of the decisions of the inferior courts.

Constitution of Wisconsin, Article 7, Section 3.

State vs. Brownell, 80 Wis. 563.

Seiler vs. State, 112 Wis. 293, 299.

In Seiler vs. State, supra, the court said, "Appellate jurisdiction extends only to the revision of the decisions of inferior courts."

A federal question cannot be raised for the first time by a petition for rehearing after judgment in the highest court of the state, so as to bring the case within the appellate jurisdiction of the United State Supreme Court.

11 Cyc. 936.

Sayward vs. Denny, 158 U. S. 180.

Loeber vs. Schroeder, 149 U. S. 580.

Miller vs. Cincinnati R. Co., 168 U. S. 131.

Fullerton vs. Texas, 196 U. S. 192.

Turner vs. Richardson, 180 U. S. 87.

Meyer vs. Richmond, 172 U. S. 82.

French vs. Taylor, 199 U. S. 274.

Corkran Oil Company vs. Arnandet, 499 U. S. 182.

In Loeber vs. Schroeder, supra, the court said, "It is also well settled by the decisions of this court that the attempt to raise for the first time a federal question in a petition for rehearing after judgment comes too late."

It is not raised in time where it first appears in the petition for writ of error from the Supreme Court of the United States to the state court.

11 Cyc. 936.

Johnson vs. New York Life Ins. Co., 187 U. S. 491.

Simmerman vs. Nebraska, 116 U. S. 54.

French vs. Taylor, 199 U. S. 274.

Chicago, Indianapolis, etc. Ry. Co. vs. McGuire, 196 U. S. 129.

In Johnson vs. New York Life Insurance Co., supra, the court said: "Conceding that it was unnecessary to set it up in any pleading anterior to the trial since it could not be claimed that the right had been denied to her until the trial took place, it was clearly her duty to make the claim either on the motion for a new trial, or in the assignments of error filed in the supreme court of the state. In neither does it appear, nor is there any allusion to it in the opinion of the supreme court. It first appears in the petition for a writ of error from this court. This is clearly insufficient."

Nor can the federal question be raised for the first time in the assignment of error to the supreme court of the United States.

French vs. Taylor, 199 U. S. 274.

In French vs. Taylor, supra, the court said, "It is said that federal questions were raised on a petition for rehearing, but this is denied, and the petition is not in the record. But if it were true, the suggestion came too late, though if the supreme court had considered and decided such alleged federal questions, we could take jurisdiction, but the court did not do so. So as to the petition for writ of error from this court, or the assignments of error here, they form no part of the record on which it is to be ascertained whether the state court decided a federal question."

To give the supreme court jurisdiction it must appear that the plaintiff in error set up and claimed some right, title, privilege or immunity under a federal statute, and that such right, title, privilege or immunity was denied by the judgment of the state court sought to be reviewed.

11 Cyc. 928.

29 Am. & Eng. Enc. of Law 248.

Beal's vs. Cone, 188 U. S. 184.

Home for Incurables vs. New York, 187 U. S. 155.

Dewey vs. Des Moines, 173 U. S. 193, 200.

Sayward vs. Denny, 158 U. S. 180.

Smith vs. Adsit, 16 Wall 185.
Farney vs. Towle, 1 Black 262.

In Sayward vs. Denny, supra, the court said: "As the validity of no treaty or statute of, or authority exercised under, the United States, nor of a statute of, or authority exercised under, any state, was drawn in question, it is essential to the maintenance of our jurisdiction that it should appear that some title right, privilege or immunity under the constitution or laws of the United States was specially set up or claimed in the state court, and that the decision of the highest court of the state, in which such decision could be had, was against the title, right, privilege or immunity so set up or claimed."

In Dewey vs. Des Moines, supra, the court said: "In order to be available in this court some claim or right must have been asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the constitution or laws or treaties of the United States. In such case, if the court below denied the right claimed it would be enough; or if it did not in terms deny such right, if the necessary effect of its judgment was to deny it, then it would be enough. But the denial whether express or implied, must be of some right or claim founded upon the constitution or the laws or treaties of the United States which had in some manner been brought to the attention of the court below. A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. A point that was never raised cannot be said to have been decided adversely to a party, who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment, which is silent upon the question, is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of."

The right, title, privilege or immunity claimed must be personal to the plaintiff in error. He is not entitled to review where the right, title, privilege or immunity was asserted by

the other party, and the decision was in favor of that party and adverse to himself.

29 Am. & Eng. Enc. of Law 248 and cases cited.

Fulton vs. McAffee, 16 Pet. 149.

Burke vs. Gaines, 19 How. 388.

Missouri vs. Adriano, 138 U. S. 496.

Texas & Pacific Ry. Co. vs. Johnson, 151 U. S. 81.

De Lamar's Nevada Gold Mining Company vs. Nesbitt, 177 U. S. 523.

Kizer vs. Texarkana & Fort Smith Ry. Co., 179 U. S. 199.

In Missouri vs. Adriano, supra, the court said: "Here is clearly a right or privilege claimed by respondent under a statute of the United States within the meaning of revised statutes section 709, and had the judgment of the Supreme Court of Missouri been adverse to his claim, there could be no doubt of his right to a writ of error from this court to review its ruling. It is insisted, however, that the relator has no right to a review of the ruling in favor of respondent, as he claimed no right or privilege, personal to himself, or to his own status as a citizen, from such statute. The question thus presented is, whether the right or privilege must necessarily be personal to the plaintiff in error, or whether he is not entitled to a review where such right or privilege is asserted by his opponent, and the decision is in favor of such opponent and adverse to himself. While there is some force in the argument that the right of review in cases involving the construction of a federal statute, should be mutual, the act limits such right to cases where the state court has decided against the title, right, privilege or immunity set up or claimed under the statute."

In Kizer vs. Texarkana & Fort Smith Ry. Co., supra, the court said: "He now says that, although he set up no claim of any title, right, privilege or immunity, under the act of Congress, yet the claim which defendant specially set up under it was acknowledged and enforced by the state court, and the statute was thus construed unfavorably as to him, and that he has, therefore, a right to have the judgment of the state court, which was based on such construction, reviewed here, under section 709 of the Revised Statutes of the United

States. But that section provides, so far as here applicable, that when any right, title, privilege or immunity is claimed under a statute of the United States, and the decision of the state court is against the title, right, etc., specially set up or claimed under such statute, then and in such case the judgment of the state court may be reviewed by this court."

"Here, the claim under the federal statute has been allowed by the state court, and the contract sued on by the plaintiff in error has been denied validity because of its violation of that statute. It is not every case where a federal statute has been construed by a state court that gives a right of review to this court, but the claim of any right, title, privilege or immunity under the statute must have been denied by the state tribunal in order to give us jurisdiction to review its judgment. That a federal statute was construed unfavorably to one of the parties to the suit is no ground for jurisdiction by this court, unless such construction was not only unfavorable, but was against the right, title, etc., specially set up and claimed under the statute. In that case the party setting up and claiming the right under the statute, which has been denied, can obtain a review here. Thus it might happen, as it has happened in this case, that, while the decision upon the construction of the statute was unfavorable to the maintenance of the cause of action set forth by the plaintiff in error, it was not against, but in favor of, the claim made under the federal statute."

Mere questions of fact present no federal questions and the findings of the jury are verities in this court.

11 Cyc. 940.

Smiley vs. Kansas, 196 U. S. 447.

Dower vs. Richards, 151 U. S. 658.

Western Union vs. Call Publishing Co., 181 U. S. 92.

In Smiley vs. Kansas, the court said: "The verdict of the jury settles all questions of fact."

In Dower vs. Richards the court said: "That this court, in an action at law, at least, has no jurisdiction to review the decision of the highest court of a state upon a pure question of fact, although a federal question would or would not be pre-

sented according to the way in which the question of fact was decided, is clearly settled * * *"

In Kaufman vs. Tredway 196 U. S. 447, the court held that whether a bankrupt was insolvent at the time of giving the alleged preference, and whether the creditor had reasoncause to believe that it was intended thereby to give a preference are questions of fact as to which the supreme court of the United States is concluded by the verdict of the jury in a suit by the trustee to recover the amount of the preference.

In Thompson vs. Fairbanks 196 U. S. 516, 523, the court said: "The question whether any conveyance, etc., was, in fact, made with intent to defraud creditors, when passed upon in the state court, is not one of a federal nature."

In McKenna vs. Simpson 129 U. S. 506, an assignee in bankruptcy brought an action in a state court to set aside a conveyance made by the bankrupt, as made to defraud creditors. The court held that when he resorted to that court and no question was raised as to his power under the acts of congress or the right vested in him as assignee, the proceedings were governed and the judgment of the court upon the validity of the conveyances was subject to review, in the same manner and to the same extent, as proceedings of a similar character by a creditor to set aside conveyances in fraud of his rights by a debtor. In the proceedings of the state court no decision was made against the validity of any statute of, or authority exercised under, the United States, or against any right, title, privilege, or immunity claimed under the constitution of the United States or any statute thereof.

CASES RELIED UPON BY PLAINTIFF IN ERROR

The decisions of this court relied upon by plaintiff in error to sustain the jurisdiction, clearly establish the want of it. In every case where the jurisdiction was sustained, the plaintiff in error set up and claimed either an affirmative defense or affirmative relief by virtue of some federal statute or treaty. None of these cases sustain plaintiff's contention, that where one party asserts a right under a federal statute and the state

court in construing that statute enforces the right claimed, that this court will review such construction at the instance of the opposite party.

In Factors Insurance Co. vs. Murphy, 111 U. S. 738, the only controversy was as to the effect to be given a sale of property made by order of the United States court, and a decision having been made adversely to the right claimed, this court took jurisdiction for the purpose of reviewing such decision.

In Traer vs. Clews, 115 U. S., 528, the plaintiff in error in the state court set up as a defense the statute of limitations of the United States, and the state court having held adversely to him, this court properly took jurisdiction to review such decision.

In Dimock vs. Revere Copper Co., 117 U. S., 559, the defendant in the state court pleaded his discharge in bankruptcy in bar of a suit. The court held such bar to be no defense, whereupon the defendant in the state court sued out a writ of error to this court, which took jurisdiction for the purpose of passing upon the effect to be given to such discharge in bankruptcy.

In Palmer vs. Hussey, 119 U. S., 96, the plaintiff in error brought an action in the state court against one to whom a discharge in bankruptcy had been granted, the plaintiff claiming that his debt was of such a character as not to be included in such discharge. The state court held against him, and this court took jurisdiction to review such decision.

In Winchester vs. Reiskell, 119 U. S. 450, plaintiff in error in the state court, by proper pleadings, alleged that the federal court had exclusive jurisdiction of the subject matter. The state court denied such contention, and this court properly took jurisdiction to review such holding.

In Williams vs. Hurd, 140 U. S. 529, an assignee in bankruptcy made claim to certain funds awarded by the Alabama Claim Commissioners, pursuant to section 5044 R. S. of U. S. The state court denied his claim and refused to enforce such statute. This court properly took jurisdiction.

In Dushane vs. Beall, 161 U. S., 513, an assignee in bankruptcy made claim to certain property under the bankruptcy

statute. The state court refused to enforce the federal statute relied upon, and this court properly held that the assignee was entitled to have such decision reviewed here.

In McCormick vs. Market National Bank, 165 U. S., 538, both parties claimed under section 5136 R. S. of U. S., one claiming the right granted by such statute, and the other claiming under the exception contained in such section, relative to the authority of United States banks to do business before authorized by the comptroller to do so. The Supreme Court of Illinois denied the claim of plaintiffs and held that under the federal statute cited, the claim of plaintiff in error could not be enforced. The assignment of error in the state court pointed out this statute specifically, and predicated rights upon it. This court properly took jurisdiction to review the decision of the Illinois court denying the rights claimed under this federal statute.

In Farmers' and Merchants' Insurance Co. vs. Dobney, 189 U. S. 301, the plaintiff in error urged the unconstitutionality of a Nebraska statute before the Supreme Court of that state, assigning such unconstitutionality as error in the court of last resort of that state. His contention was denied, and this court properly took jurisdiction to review such decision.

In Crawford vs. Burke, 195 U. S., 176, the defendant in the state court set up his discharge in bankruptcy as a defense, and the state court held it did not apply to the debt sued upon. The defendant in the state court thereupon sued out a writ of error to this court, which properly took jurisdiction.

In Kaufman vs. Tredway, 195 U. S. 271, a set off was claimed by the defendant in the state court, pursuant to the provisions of section 60c of the bankruptcy act. The state court held the claim made did not constitute a set off under such section, and this court took jurisdiction to review such decision, at the instance of the defendant in the state court.

In Thompson vs. Fairbanks, 196 U. S., 516, a trustee in bankruptcy brought an action in the state court to recover a preference, and the state court refused to enforce the bankruptcy act upon which he relied. This court took jurisdiction at the instance of the trustee.

In Humphrey vs. Tatman, 198 U. S. 91, the Massachusetts supreme court refused to follow its own decisions in deference to the supposed provisions of the bankruptcy act, after this court had held by a former decision that the question involved should be governed solely by the laws of the State of Massachusetts. This was in effect denying the effect of the decisions of this court in construing the bankruptcy act, and this court took jurisdiction at the instance of the plaintiff in error, who claimed the right to retain the property in question by virtue of such former decision.

In Nutt vs. Knut, 200 U. S. 12, decided January 2nd, 1906, the defendant in the state court set up as a defense the invalidity of the contract sued upon, by reason of a statute of the United States, prohibiting the assignment of claims against the United States. The state court overruled the defense and refused to give effect to the federal statute relied upon. This court, of course, took jurisdiction by writ of error sued out by the defendant, whose rights under the federal statute were denied.

ARGUMENT.

From the foregoing authorities it is apparent that this court has no jurisdiction to review the decision and judgment of the Supreme Court of Wisconsin in this case, unless it clearly appears from the record,

(a) That a federal question was raised by the plaintiff in error in the state court, by specially setting up some right, claim or immunity under the federal statutes.

(b) That the question so raised was actually decided by the Supreme Court of Wisconsin, adversely to plaintiff in error.

(c) That such right, title or immunity so set up was personal to plaintiff in error.

(d) That such question was presented and right claimed by pleading, motion, exception or other action, which is part of the record, showing that the alleged federal question was clearly presented to and passed upon by the state court.

And it is equally apparent that in determining what is shown by the record, for the purpose of determining jurisdiction, no proceeding subsequent to the entry of judgment appealed from, constitutes any part of the record. This rule eliminates entirely,

(a) A certificate of the Chief Justice of the State of Wisconsin sent to this court as a supplemental return, since the filing of the pending motion.

(b) The petition for rehearing addressed to the state court.

(c) The petition for the allowance of a writ of error to this court.

(d) The assignments of error made in this court.

An examination of the record here presented under the foregoing rules, shows clearly that the attempt to inject a federal question into this case is an after-thought, and that such a question was never raised in the trial court or appellate court of Wisconsin, or suggested until after the court of last resort of that state had affirmed a judgment, adverse to plaintiff in error.

The only questions presented by the pleadings in the trial court were, First, Did the bankrupt give to plaintiff in error a preference? and Second, Did plaintiff in error accept such preference, with reasonable ground to believe it was intended as such? These were the two questions litigated on the trial and passed upon by the jury. The action was brought by the plaintiff and defendant in error to recover the value of property, which he alleged had been transferred by the bankrupt to plaintiff in error, within four months of the adjudication, and which was received by it with reasonable cause to believe that such transfer was intended as a preference. The Wisconsin court enforced such right. The defendant and plaintiff in error made no claim under any federal statute, but simply took issue with the facts alleged in the complaint. The plaintiff alleged a state of facts, which if true, entitled him to recover by reason of section 60b of the bankruptcy act. The defendant denied the insolvency of the bankruptcy at the time of the transfer and denied having reasonable ground to be-

lieve that the transfer was made to it for the purpose of giving it a preference. Its answer was in substance a general denial. Plaintiff in error now contends that the state court erred in its construction of this federal statute; but this court is not vested with jurisdiction to correct all errors of state courts. Congress, prior to the amendment of February 5th, 1903, vested jurisdiction in actions by a trustee to recover a preference, solely in the state courts, without any attempt to extend the appellate jurisdiction of this court in actions of that character. The jurisdiction of this court therefore, must be tested in precisely the same manner as in cases where state courts, in the exercise of their jurisdiction, are called upon to give effect to, or construe, any other federal statute. If this court has jurisdiction to review this judgment, it is because this court can review any judgment where the state court in charging a jury as to a question of fact deems it necessary to define to them the meaning or the effect of a federal statute. This is clearly not sufficient.

Suppose A brings an action against B in a state court to enforce a penalty provided by a federal statute, and B pleads not guilty. Can it be said that B has specially set up or claimed an immunity under the statute sued upon, and that in the event that the state court enforces the penalty, B can have such decision reviewed in this court? Such is the contention of plaiatiff in error. It was the same contention made to this court in Kizer vs. Texarkana & Ft. Smith Ry., Co. supra, where this court said: "Plaintiff in error now says that although he set up no claim of any title, privilege or immunity under the act of Congress, yet the claim which defendant in error specially set up under it was acknowledged and enforced by the state court, and the statute was thus construed unfavorably as to him, and that he has therefore a right to have the judgment of the state court, which was based on such construction, reviewed here, under section 709 of the Revised Statutes of the United States. But....it is not every case where a federal statute has been construed by a state court that gives a right to review to this court..... That a federal statute was construed in favor of one of the

parties to the suit is no ground for jurisdiction by this court, unless such construction was not only unfavorable, but was against the right, title or immunity specially set up and claimed under the statute. In that case the party setting up a claim or right under the statute which has been denied, can obtain a review here. Thus, it might happen, as it has happened in this case, that while the decision upon the construciton of the statute was unfavorable to the maintenance of the action set forth by the plaintiff in error, it was not against, but in favor of the claim made under the federal statutes."

If, on the verdict of the jury finding that plaintiff in error had received a preference within four months of the adjudication, with reasonable ground to believe the transfer in question was intended as a preference, the state court had refused to enter judgment in favor of defendant in error, pursuant to the provisions of the bankruptcy statute, it is clear that such defendant in error would have been entitled to have the decision of the state court reviewed here, because in that case the state court would have refused to enforce a right claimed under the federal statute; but merely denying liability under a federal statute, cannot be said to be "specially claiming a right, title or immunity" under it. If so, this court would be vested with jurisdiction to review every decision of the state court, which depended upon a construction of a federal statute, under which either party claimed, whether such decision was in favor of, or against the party setting up the claim, and the provision of section 709, limiting the powers of this court to cases where the right, title or immunity specially set up was denied, would be meaningless.

The sole contention of plaintiff in error is that the verdict found by the jury is not supported by the facts, and that the jury have rendered such erroneous verdict under improper instructions. If this court were to assume jurisdiction, it would be for the sole purpose of testing the correctness of the verdict of the jury and as to whether or not the trial court, in enforcing a right claimed under a federal statute, had erred in its rulings as to the admissibility and rejection of

evidence, form of special verdict or in its instructions.

It is respectfully submitted the record presents nothing but a question of fact, and that the writ of error should be dismissed.

BRIEF ON THE MERITS

NATURE OF ACTION AND LEADING FACTS.

This is an action brought by plaintiff as trustee of the estate of a bankrupt, to recover the value of a preference received by defendant within four months before the filing of the petition in bankruptcy, such preference having been received by plaintiff in error with reasonable ground to believe that it was intended as such, under the provisions of section 60b of the Bankruptcy Act of 1898, which provides, "If a bankrupt shall give a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it or to be benefitted thereby, or his agent acting therein, shall have had reasonable cause to believe it was intended thereby to give a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

VERDICT.

The jury have found that on February 20th, when the bankrupt gave plaintiff in error the chattel mortgages mentioned in the complaint, he was insolvent; that he was insolvent on March 3rd, when he transferred the mortgaged lumber to the Waters-Clark Lumber Company, and on March 29th when he transferred the mortgaged logs and other logs to the Waters-Clark Lumber Company; that the Waters-Clark Lumber Company was acting for the bank when it took the legal title to the lumber and logs in question, under an arrangement between said Lumber Company, the Bank and the bankrupt, by which the bank was to receive the benefit by receiving a portion of the proceeds; that when the bankrupt executed the chattel mortgages and afterwards transferred the lumber and logs to the Waters-Clark Lumber Company, he intended to give the bank a preference; and that at the time the mortgages were given and at the time the lumber and logs were trans-

ferred, the agents of the bank, acting for it, had reasonable cause to believe that the bankrupt thereby intended giving it a preference. (p. 16 record.)

In addition to this verdict, by stipulation of parties, the trial court found the value of the property afterwards transferred by the bankrupt to Waters-Clark Lumber Company, the amount of the proceeds which was by the latter company paid over to the bank in discharge of lienable time checks it held, and the amount paid to it and applied on the bankrupt's notes, it held, as follows:

(a) That the value of the lumber, etc., embraced in one of the mortgages given by the bankrupt to plaintiff in error on February, 20th, 1902, was in excess of $3,452.85.

(b) That the value of the lumber alone embraced in said mortgage, which was transferred to the Waters-Clark Lumber Company on March 3rd, 1902, was $3,452.85.

(c) That the value of the note given by Waters-Clark Lumber Company to the bankrupt, and by him turned over to the defendant for said lumber, was $3,452.85.

(d) That the value of the Cadott logs embraced in the mortgage of February 20th, 1902, was $10,077.84.

(e) That the value of the note given by Waters-Clark Lumber Company to Young as part payment for the logs, which note was delivered to plaintiff in error by the bankrupt on March 29th, 1902, was $2,508.14.

(f) That the value of the up-river logs which were transferred by the bankrupt to Waters-Clark Lumber Company on March 29th, 1902, was $11,055.84 (pp. 17-18 record.)

On the trial the parties entered into a stipulation, (p. 254 record) as to the amount of lienable and non-lienable time checks which plaintiff in error held on February 20th, 1902, when the mortgages were given, and on March 29th, 1902, when the logs were transferred to the Waters-Clark Lumber Company, including the following stipulation:

"That the total amount received by the bank on claims that it held on February 20th, 1902, (when the mortgage was given), not including what was paid to it on labor orders, was $6,660.99."

It thus appears from this stipulation that the bank was actually paid, out of the proceeds of the logs and lumber, the sum of $6,660.99, exclusive of what it received for the time checks it held. (p. 254 record.)

JUDGMENT.

The trial court entered judgment for this sum, less $406, which the court erroneously thought represented advancements made after receiving the mortgages, in taking up non-lienable time checks. (p. 274 record.) This was in direct violation of the stipulation of parties, from which it appears that the $406 of additional advancements was made after the mortgages were given on February 20th, and before March 29th when the logs were transferred, at which latter date the bank held $1,106 of non-lienable claims. (p. 254 record.) It was conceded on the hearing before the Supreme Court, that this $406 should not have been deducted, but that other errors in computation left the judgment entered substantially correct. (p. 310 record.)

The judgment entered by the court included the entire proceeds of the mortgaged lumber paid for by Waters-Clark Lumber Company to Young by note, and by him immediately turned over to the bank on March 3rd, 1902, amounting to	$3,452.85
And the net proceeds of the logs sold by the bankrupt to Waters-Clark Lumber Company, which was arrived at by deducting from the purchase price all outstanding labor liens, and for which that company gave the bankrupt a note, which was immediately turned over to the plaintiff in error, which amounted to.....	2,508.14
Together with non-lienable time checks held by the bank at the time the mortgages were given, and which were paid to it by Waters-Clark Lumber Company, amounting to	700.00
Total....	$6,660.99
Less $406 erroneously deducted, leaving $6,254.99, for	

which, with interest from the commencement of the action, judgment was entered. (p. 274 record.)

From this judgment, both parties appealed to the Supreme Court of Wisconsin, the plaintiff (defendant in error) insisting that some one of his various motions for judgment should have been granted (pp. 301-302 record), and that the trustee was entitled to recover the value of the property in whatever form it can to the bank, within four months prior to the adjudication, whether applied by it to the payment of time checks or on its general indebtedness. It was insisted by the trustee that the state court in this action could not determine as to whether or not such labor liens constituted preferred claims or otherwise, and that as the undisputed evidence showed that no claim for lien had been filed, as required by the Wisconsin statute, no lien actually existed; and that the trustee should have recovered the value of the two notes turned over to the bank, together with the sum of $5,437.42, the amount paid to it for time checks it held when the mortgages were given, which sums aggregated $11,398.41. (p. 474 record.) The state court denied plaintiff's contention and gave judgment only for the amount received by the bank and applied by it on its indebtedness evidenced by notes and nonlienable time checks.

LEADING FACTS.

Although the facts as found by the jury are verities in this court, it may assist to a clear understanding of the verdict and of the errors assigned, if a brief statement of the leading facts established by the evidence is made. The bankrupt, Young, was the owner of a small mill which he operated in the vicinity of Eau Claire, Wisconsin, for two or three years previous to June 7th, 1902, when he was adjudicated a bankrupt. He commenced dealing with the plaintiff in error in 1900, at which time he borrowed $2,000. (p. 96 record.) This indebtedness continued to increase, until February 20th, 1902, the date of the mortgages in question, when it amounted to $27,000. A few days prior to giving the mortgages his mill burned, leaving him without means of manufacturing the saw

logs then on hand. The bank collected the insurance on the mill and insisted upon his giving a chattel mortgage, covering his logs and lumber. After protesting that he could not do this in fairness to his other creditors, he finally yielded, and the mortgages were executed and delivered on February 20th, 1902, covering all of his lumber, lath and shingles and a large portion of his saw-logs—in fact, all except the so-called up-river logs, in which he had an interest of only $900. (pp. 113 to 115 record.) D. S. Clark was president of a company doing business at Duluth, known as Waters-Clark Lumber Company, and was also director in defendant bank. (p. 21 record.) On March 3rd, 1902, the bankrupt was requested to come to the banking house of the plaintiff in error, where he was told that the mortgages he had given would not hold as against his other creditors, and he was requested to transfer the lumber included in the mortgage to the Waters-Clark Lumber Company, the president of which was then present. (pp. 114 to 116 record.) This was done, and the Waters-Clark Lumber Company in payment executed a demand note, payable to the bankrupt, for $3,452.85, which was by him indorsed and then and there turned over to Mr. Coffin, the cashier of the defendant bank. (p. 22 record.) Soon after, the officers of defendant bank requested the bankrupt to execute a like bill of sale of all his logs to the Waters-Clark Lumber Company, which he did by bills of sale, dated March 29th, 1902. (pp. 24-25 record.) The Waters-Clark Lumber Company paid for these logs by deducting from the price mentioned in the bills of sale the outstanding time checks, and executing a note to the bankrupt for the difference, amounting to $2,508.14, which note was by the bankrupt then and there turned over to the defendant bank. (p. 28 record.) The bills of sale given by the bankrupt to the Waters-Clark Lumber Company of both lumber and logs, were made at the request and solicitation of the officers of the bank, pursuant to an agreement by which the time checks which the bank held were to be paid and any excess over the amount necessary to pay other time checks was to be given to the bank to apply on its indebtedness, to secure which the mortgages of February 20th, 1902 had been given. (p. 44 to 50 record.) The Waters-Clark Lumber Com-

pany immediately proceeded to sell the lumber for which it bad agreed to pay Young $3,452.85 for $2,421.21 and sold the logs for which it had agreed to pay $21,073.68 for $17,050, thus apparently losing $4,000 in the transaction. (pp. 25-33 record.)

On June 7th, the very day on which the petition in bankruptcy was filed, the Waters-Clark Lumber Company gave defendant bank a check for $13,813.50, to cover the time checks it held against the property and which might have become liens had the Wisconsin statute been complied with. (p. 83 record.) No part of this check is embraced in the present judgment, as the notes were not paid until during the trial of this cause in the state court in March, 1903. (pp. 22-23 record.)

In addition to the $27,000 of indebtedness due to plaintiff in error, and in addition to outstanding time checks, the bankrupt owed debts which were filed in and allowed by the bankruptcy court, amounting to $12,265.56, of which amount about $1,500 was preferred. (pp. 67-68 record.)

In addition to the money received from Waters-Clark Lumber Company within four months prior to the adjudication, the defendant bank collected $725.81 on April 5th, 1902 on account of insurance on the mill. (p. 77 record.) This is not included in the judgment.

ERRORS ASSIGNED BY PLAINTIFF

FIRST, That the Supreme Court of the State of Wisconsin erred in determining that the plaintiff's complaint therein stated a cause of action, and in refusing to reverse the judgment for that reason.

Before the state supreme court, plaintiff in error abandoned the other grounds for demurrer, except the one now assigned as error and urged two defects in the complaint; namely, because such complaint did not allege a demand for the return of the property, and because it contained no allegation that other creditors had filed claims in the bankruptcy proceeding. Both of these are sufficiently answered by the Wisconsin Supreme Court at page 302 record.

SECOND, That said state court erred in determining that the defendant, Eau Claire National Bank, was liable in said action for the value of the logs and lumber described in plaintiff's complaint, to the extent of the chattel mortgage interest of the defendant therein.

The undisputed evidence is conclusive that plaintiff in error took chattel mortgages on the property of the bankrupt within four months of his adjudication as a bankrupt, and at a time when the bankrupt was wholly insolvent, with reasonable cause to believe that such mortgage was given for the express purpose of giving it a preference over other creditors. The fact that the bank, instead of taking possession of the mortgaged property and completing the foreclosure it had commenced, induced the bankrupt to convey the property to the Waters-Clark Lumber Company, under an agreement between all of the parties that the bankrupt should receive no part of the consideration, and that all should be applied to paying the liens against the logs, a large portion of which were held by the bank, and the balance turned over to it to be applied on its general indebtedness, is now urged as a successful evasion of the bankruptcy law, and that notwithstanding every condition requisite to liability was found by the jury, that the court erred in entering a judgment in conformity to section 60b on such verdict.

THIRD, That said court erred in determining that defendant was liable in said action for having received as a preference, contrary to the provisions of section 60a and section 60b of the bankrupt act of July 1, 1898, as a portion of his chattel mortgage interest in said logs, the sum of $1,335.62 as the proceeds of the sale of the portion of said logs known as the up-river logs, on which logs said defendant never held any chattel mortgage, and which logs were never transferred to said defendant.

It is a sufficient answer to this contention that plaintiff in error never raised this question in the state court until after the judgment appealed from was affirmed by the Supreme Court of Wisconsin. Before the Supreme Court it was urged that the judgment was excessive, in that the sum of $377.05

should have been deducted, on account of overpayment by Waters-Clark Lumber Company of that amount to the holders of time checks, and that therefore the note given by it to Young for the balance of the purchase price of the logs, should have been reduced by that amount. The Supreme Court held, however, that as the trial court had erroneously deducted $406 on the supposition that the bank had advanced that amount, after the mortgages were taken, that the two errors substantially offset, and refused to reverse on that ground. The question now presented by this assignment of error was not even suggested.

But, if it had been, the result must have been the same. It is conceded that this sum of $1,335.62 was actually included in the note given as part purchase of the logs, and by the bankrupt turned over to plaintiff in error, at a time when to make such payment was in violation of the statute; hence the trustee had a right to recover that sum. The trustee was entitled to recover any and all preferences received by plaintiff in error, with guilty knowledge, within the period of four months prior to June 7th, 1902, including the proceeds of any property he sold, encumbered or unencumbered, and including the insurance on the mill, which admittedly was turned over and applied on his indebtedness to the bank. The claim now made for the first time that the trustee can recover nothing except the identical money which was paid to the plaintiff in error out of the proceeds of the mortgaged property, and that it has a right to retain all payments it received as a guilty participant in a fraud upon the bankruptcy act, because the money it received cannot be identified as the proceeds of the mortgaged property, is clearly untenable.

FOURTH. That said court erred in determining that the defendant was liable in said action for the value of those certain notes and moneys it had received, for which the judgment in said action was rendered against it, as a preference under the provisions of said bankrupt act, although the plaintiff trustee had not elected to avoid such preference by bringing suit to recover the same and had not elected to avoid such preference in any manner whatever.

This assignment is based on the supposition of a fatal variance between the proof and the complaint.

Section 2669 R. S. of Wis. provides, "No variance between the allegation in a pleading and the proof, shall be deemed material unless it shall actually mislead the adverse party to his prejudice in maintaining his actioa o defense upon its merits."

The complaint specifically alleged, not only the execution of the mortgages covering the lumber and the Cadott logs on February 20th, 1902, but further alleges: "that after said 20th of February, 1902, the bankrupt, at the special instance and request of plaintiff in error, transferred by absolute bills of sale to Waters-Clark Lumber Company all of the property mentioned and described in said chattel mortgages, together with certain other saw-logs then owned by said Young;..... that immediately on the execution of said bills of sale said Waters-Clark Lumber Company pursuant to directions by and in behalf of the bank, took possession of all the property so transferred, and thereafter sold the same and applied the proceeds to the payment of the indebtedness secured by said mortgages."

This was an allegation of a preference made by payment, as well as by giving the mortgages, and was so treated on the trial. Both sides litigated the question of recovery, not only for the value of the lumber embraced in the mortgage, but for the amount of money actually paid to the plaintiff in error, to be applied on the notes and time checks issued by the bankrupt, and which it held.

But it was immaterial how the preference was given. If through the mortgages, bills of sale, agreement or otherwise, the plaintiff in error was paid either directly by Young, or by Waters-Clark Lumber Company, who purchased his property, at any time within the prohibited period, and it received such payment with guilty knowledge, it is liable for the amount it received.

Sterns vs. Trust Co., 112 Fed., 501.
Western Tie Co. vs. Brown, 129 Fed., 728.
Schwartz vs. Bank, 117 Fed., 1.
Woolen Co. vs. Powell, 72 S. W., 723.

As stated in Western Tie Co. vs. Brown, supra, in an opinion by Judge Sanborn: *The test of a preferential transfer under the bankruptcy act is not whether the debtor has conveyed anything to the creditor, or whether the creditor has received anything from the debtor.* It is whether or not the debtor has made a transfer of any of his property to any one in any way, whereby the enforcement of the transfer will enable one of his creditors to obtain a greater percentage of his debt than any other creditor. So the question is not whether the insolvent transferred any of his property directly to the Tie Company, but whether any transfer of his property was made in the time and manner denounced by the bankruptcy law, so that that company was enabled to secure a larger percentage of its claim against him than other creditors. One of the main purposes of the bankruptcy law is to distribute the unexempt property which the bankrupt has four months before the filing of a petition in bankruptcy, share and share alike, among his creditors."

So in this case, it is wholly immaterial whether any property was transferred by mortgage or otherwise to the plaintiff in error. If the bankrupt in any way transferred to any person any of his property, under any arrangement, the result of which was that the plaintiff in error was to receive the proceeds or some part of it, and equal provision was not made for all his other creditors, it was, as to it, an unlawful preference, and can be recovered by the trustee, who demanded judgment before the trial court for all that was paid to the plaintiff in error regardless of whether it was paid to it on time checks or general indebtedness, believing that it was the province of the bankruptcy court in the final distribution, to declare what were preferred and what were not preferred claims, instead of the state court. This was denied, the state court refusing to give judgment for any amount except what plaintiff in error actually received, and applied upon what the court was pleased to call non-liquidable debts. Under this state of the record, it is submitted that the trustee has exhausted every means in his power to avoid the preference given, and the whole of it.

Courts have been frequently called upon to pass upon devices and schemes like the one at bar, intended to cover illegal preferences, and uniformly hold that any scheme resulting in one creditor receiving, directly or indirectly, any part of his debt, in excess of the amount other creditors of the same class would receive by an equal disaribution, is void.

In re. Stein, 22 Fed. Cases, 1232.
Fleming vs. Andrews, 3 Fed., 632.
In re. Beerman, 112 Fed., 664.
Bardes vs. Bank, 98 N .W., 284.
Hackney vs. Bank, 98 N. W., 412.
Hackney vs. Hargrave, 98 N. W., 626.
In re. Belding, 116 Fed., 1016.

In most of these cases the claim was made that a creditor could be held only for property which was actually transferred to him, and that as in most of them, the property had been rtansferred to some third person, who was not a creditor, under some arrangement by which the creditor was to receive a part of the proceeds, such creditor could not be held guilty of receiving an unlawful preference. But the courts have uniformly held that a transfer of property to a third person, the result of which was to enable some creditor to get a portion of the proceeds, in violation of the bankruptcy act, was in legal effect a transfer to the creditor, and that such creditor could be held liable for the value of the property transferred.

Fifth, That said court erred in determining that in order to ascertain whether or not the defendant was liable for having received a preference under the provisions of said bankrupt act, it was immaterial whether or not the defendant and the other creditors of the bankrupt were creditors of the same class, and said court erred in refusing to reverse said judgment, because of the error of said circuit court in charging the jury that all the creditors of said bankrupt were creditors of the same class.

What was said by the Supreme Court of Wisconsin sufficiently answers this assignment. (p. 365 record.)

In addition it appears by the undisputed evidence in the case that plaintiff in error held unsecured notes and non-lien-

able time checks of the bankrupt, amounting to $24,348.52. (pp. 74-75 record) of which it was paid by Waters-Clark Lumber Company the amount for which judgment was entered, $6,254.99, leaving a balance due the plaintiff in error of substantially $17,000. It is further established by the undisputed evidence by the records of the bankruptcy court, that there were other unsecured creditors, with claims aggregating something over $12,000. (pp. 67-68 record). The inevitable result of the bankrupt paying plaintiff in error or any other creditor any sum, or transferring to either of them any property, without making a like provision for the other unsecured creditors, would be to give to the persons so paid, or to whom such property was transferred, a preference over such other creditors who were of the same class. A person who is not possessed of a sufficient amount of property, at a fair valuation, to pay all his debts, cannot pay any one, without giving a preference, unless the one paid held security, and the payment was realized out of the encumbered property. Under this state of the evidence the charge of the court complained of is correct although wholly immaterial, and the state court so held.

Schwartz vs. Bank, 117 Fed, 1.

Livingston vs. Heinneman, 120 Fed., 186.

SIXTH, That said court, in determining that the defendant had reasonable cause to believe that a preference was intended, erred in the construction of said bankrupt act in the following respects:

(a) In determining that where the effect of the enforcement of a transfer from an insolvent debtor is to enable any of his creditors to obtain any portion of his debt, and that transfer is followed within four months by the commencement of bankruptcy proceedings, that such a transfer would necessarily enable such creditor to obtain a greater percentage of its debt than other creditors of the same class, and would constitute a preference within the meaning of said bankrupt act.

In the state court, plaintiff in error contended with apparent seriousness, that a person who was hopelessly insolvent, owing thousands of dollars of unsecured debts to a large

number of different creditors, could transfer or make a payment to one of such unsecured creditors, without such transfer or payment necessarily constituting a preference; and to sustain such theory, plaintiff in error presented to the state court, a remarkable computation, from which it appeared that the bankrupt owed plaintiff in error substantially $25,000, and was paid out of the proceeds of the property transferred to Waters-Clark Lumber Company, a sum equal to 26½ per cent of its unsecured indebtedness. It was then insisted that plaintiff in error having received a preference (thereby admitting the whole contention), would not be permitted to participate with other creditors as to the remaining portion of its indebtedness. The remaining portion of the bankrupt's unsecured indebtedness, eliminating the balance due to plaintiff in error, was then computed, and by comparison with other property which plaintiff in error insisted was available for the payment of such debts, it was computed that the other creditors would receive more than 26½ per cent on their claims.

This computation is stated in brief of plaintiff in error on motion to dismiss writ at page 3, and when analyzed shows the following:

At the time of the transfers in question the bankrupt owed plaintiff in error on unsecured indebtedness	$24,348.52
All other unsecured debts that bankrupt was then owing	7,948.81
Total indebtedness admitted by computation	$32,297.33
Counsel further state (in brief p. 3) that the assets of the bank at that time consisted of the value of the property left to pay other creditors, (this was disputed)	$14,680.00
And amount of his interest in the logs and lumber, which was paid to the bank	6,254.99
Total assets	$20,934.99

It thus appears from the brief of counsel that the bankrupt at the time the transfers were made, had property of the

value of $20,934.99, with which to pay his unsecured creditors, amounting to $32,297.33, and yet, it is insisted that $6,254.99 of these assets could be turned over to one creditor without giving that creditor a preference.

In the state court defendant in error demonstrated by like computation, that after the bank had been paid the amount for which judgment was taken, and that had been credited upon its unsecured indebtedness, the bankrupt still owed unsecured debts aggregating $24,843.43 (not including $18,000 due to labor) which under the undisputed evidence the officers of the bank knew all about, and in addition many thousands of dollars, of which the bank's officers disclaimed any knowledge, and that the value of all available property which the bankrupt still had, giving it the most favorable construction possible amounted to only $4,780 or about 19 per cent; whereas the bank had already been paid 26½ per cent of its claim. The jury and trial court on the evidence found against plaintiff in error on the conflict of evidence as to the value of the remaining property consisting of accounts receivable old logging outfit, etc.

As stated by the Supreme Court of Wisconsin in its opinion, (p. 309 record): "It is too clear to admit of reasonable controversy, that if a creditor receives security for the payment of his claim....and yet have the same standing as other creditors for the balance of his claim as he would have if the transaction were valid, the effect would necessarily be to give such creditors an undue advantage and a preference within the meaning of the bankruptcy act."

Toff et. al. vs. Martin, 13 Wallace, 46.

The whole question, however, as to whether or not the officers of the bank had reasonable cause to believe that Young intended by the sale to give it a preference, or reasonable cause to believe that it was getting a preference, is purely a question of fact for the jury and the jury have found, on ample evidence, against plaintiff in error.

Crittenden vs. Barton, 69 N. Y. Sup. 559.

Giddings vs. Dodd, 10 Fed., 338.

In re. Forsyth, 9 Fed. Cas., 465.

In re. McDonough, 16 Fed. Cas., 68.
In re. Eggert, 102 Fed., 735.
In re. Graham, 110 Fed., 135.
Hackney vs. Clark Co., 94 N. W., 822.
Bardes vs. Bank, 98 N. W. 28.
Decisions of this court cited in brief on motion to dismiss.

(b) In determining that although the effect of the enforcement of the transfer in question did not operate to give the defendant a greater percentage of its debt than other creditors of the same class, that, nevertheless, such transfer constituted a preference within the meaning of said bankrupt act.

The Supreme Court of Wisconsin did not so hold. On the contrary, that court properly held that whether such instruction was right or wrong, did not in any way concern this case.

We have before shown that there were at least *other* creditors in the same class as plaintiff in error, and this would be sufficient. If there was but one other creditor, whose debt was unsecured, the bankrupt could not pay the plaintiff in error a dollar, or transfer to it, directly or indirectly, any part of his property, while he was insolvent and within four months of filing his petition, without making like provision for that other creditor, without such payment or transfer constituting a preference under the bankruptcy law. The plaintiff in error evidently wishes this court to treat it as in a class by itself, because it was the only one of the many creditors of the bankrupt who procured security for its indebtedness, in violation of the bankruptcy act; and then asks this court to reward its violation of the law by permitting it to keep all that it received, because being the only creditor of that class, it cannot be said to have received a larger percentage of its claim than other creditors of that class. The contention seems to answer itself.

(c) In determining by such rules of construction of said bankrupt act, that the evidence was sufficient to sustain the finding that the defendant had reasonable cause to believe that a preference was intended, whereas, under proper construction of said bankrupt act, it appears by the uncontroverted evidence

that said defendant did not have reasonable cause to believe that a preference was intended.

The opinion of the Supreme Court of Wisconsin is a sufficient answer to this contention. (p. 308 record.)

SEVENTH, That said court erred in determining that the defendant, having received a preference which was voidable by the trustee, was for that reason liable in said action for the full value of such preference so received, in an amount in excess of what was necessary to pay all the other creditors of said bankrupt.

The Supreme Court of Wisconsin did not hold that the turstee was entitled to recover an amount in excess of what was necessary to pay all the other creditors of said bankrupt, for the reason that such question was not before it. The judgment appealed from is for $6,254.99, while the undisputed evidence in the case shows that in addition to what the bankrupt owed the plaintiff in error, he owed other unsecured debts to an amount exceeding $10,000, as appears from the duly certified copy of records of the bankruptcy court. (pp. 67-68 record.) Counsel in his brief on the motion to dismiss, at page 3, states the amount the bankrupt was owing to other unsecured creditors at $7,948.81, but section 60b of the bankrupt act provides that if a bankrupt shall give a preference and the person receiving it had reasonable cause to believe it was intended thereby to give a preference, it shall be voidable by the trustee *and he may recover the property or its value from such person.* This fixes the amount of recovery as well as the conditions of liability.

Plaintiff contended in the state court that he was entitled to recover, either the entire value of all of the property; (that is, of the logs and lumber transferred first by way of mortgage and subsequently by bill of sale;) or, he at least was entitled to recover all that was paid to plaintiff in error out of the proceeds of the property transferred, whether such proceeds were applied to pay labor liens or on general indebtedness, leaving it for the bankruptcy court to determine as to whether or not the alleged lienable claims constituted preferred claims under the bankruptcy act. All of these contentions were denied by the state court, which affirmed a judgment for the

amount, only, which was paid to plaintiff in error, and by it applied on its unsecured indebtedness. As this judgment is concededly less than the aggregate of indebtedness due to other unsecured creditors, this assignment of error is without merit.

This question does not appear in anything of record in this case and was first injected into it by the certificate of the Chief Justice of the State of Wisconsin, made and filed in this court as a supplemental return, after the motion to dismiss the writ had been made.

EIGHTH, That said court erred in determining that the defendant was liable to the plaintiff trustee for moneys required by said trustee to pay the claims of fictitious creditors whose claims were not proven by the evidence, and claims of creditors who had themselves received preferences, and in giving judgment against defendant therefor.

We do not understand what is meant by fictitious creditors or claims not proven.

The trial court of Wisconsin received in evidence a certified copy of the record of the United States District Court having jurisdiction of the bankruptcy proceedings, from which it appeared that there had been filed and allowed claims aggregating $12,265.56, of which amount about $2,500 was in part secured, and about $200 preferred claims, leaving between nine and ten thousand dollars of unsecured and unpreferred indebtedness. (pp. 67-68 record.) This record was properly admitted.

Hackney vs. Hargrave, 92 N. W. 626—also 99 N. W. 675.

In addition the state court received in evidence certified copies of claims filed by Sallie F. Moon for $6,000, Valley Lumber Company for $2,500, Eau Claire Grocer Company for $1,496.68, Eau Claire Mill Supply Company for $373.37, Knapp Stout & Co. Company for $233.30, McDonough Manufacturing Company for $142.54, Daniel Shaw Lumber Company for $100, Alex Lentz for $150, etc. (pp. 188 to 200 record.) In addition to this documentary evidence the bankrupt Young testified in detail to his indebtedness on February 20th, 1902, (pp. 103 to 107 record.) and which in

the aggregate amounted to something over $10,000, exclusive of notes and time checks.

No evidence was offered or received tending to show that any of these creditors "had themselves received preferences," and reference to such preferences in the eighth assignment of error is an uncalled for suggestion not warranted by anything found in the record.

NINTH, That said court erred in refusing to limit the recovery against the defendant to such sum as should be sufficient after the payment of expenses and costs to pay all the other creditors of the bankrupt, whose claims were provable and proven, and entitled to be allowed under the provisions of the bankrupt act.

As before stated, the amount of the judgment is wholly inadequate to pay the creditors mentioned in this assignment.

TENTH AND ELEVENTH, What has been said is sufficient answer to these assignments. The Supreme Court of Wisconsin in affirming the judgment, did not pass upon the questions involved in the seventh, eighth and ninth assignments of error. Judgment was affirmed without the necessity of doing so.

REPLYING TO BRIEF OF PLAINTIFF IN ERROR.

Since writing the foregoing, we have been furnished with a copy of brief of plaintiff in error, and will discuss each proposition in its order:

FIRST, *Jurisdiction of this court.*

The cases cited have been hereinbefore discussed.

SECOND, *That the trustee has not elected to avoid nor brought suit to recover any preference that the bank may have received, and the judgment rendered therefor cannot be sustained.*

Under this proposition it is urged that the state court erred in overruling a demurrer to the complaint, for failure to allege that a demand was made by the trustee before commencing suit. But a demand is not necessary.

4 Cyc, 243.
Bull vs. Houghton 65 Cal., 422.
Cramton vs. Marble Co., 1 L. R. A. 120.
Goldberg vs. Harlan, 67 N. E. 707.
Barbour vs. Priest, 103 U. S. 293.
Toff vs. Martin, 13 Wallace, 46.

In Goldberg vs. Harlan, supra, the precise question was raised and it is there said: "No demand for a restoration of the goods or their value was necessary before the commencement of the action. The whole transaction under the bankruptcy act was unlawful, and in such cases demand is unnecessary."

The evidence, however, conclusively shows that demand for the return of this property or its value was made upon plaintiff in error before this action was commenced. (120-125 record.)

It is further urged that the preference received by the bank for which judgment was recovered, was not the preference alleged, nor the one to recover which, suit was brought. This is based upon the erroneous assumption that plaintiff in error could not be held to have received a preference, unless it was shown that the mortgaged property actually went into its possession. The cases cited at pages 35 and 37 of this brief, conclusively show that a sale by a bankrupt while insolvent, to a third person, not a creditor, under an arrangement by which the purchase price or some part of it is to go to some one of his creditors, is giving a preference to such creditor, and is, in legal effect, a transfer of the property, to that extent, to the creditor receiving such preference. But in this case the complaint alleged not only the transfer of certain of the bankrupt's property to plaintiff in error by way of mortgage, but alleges that subsequently the bankrupt conveyed or transferred the mortgaged property to the Waters-Clark Lumber Company "with the understanding and agreement with plaintiff in error and the bankrupt that it, the Waters-Clark Lumber Company, would account to plaintiff in error for the proceeds of the property transferred, to the amount of its indebtedness." (11 record.)

This transfer was made to the Waters-Clark Lumber Company before plaintiff in error had started to foreclose the mortgages on the logs or the notices of sale had been posted. (p. 44 record.) All this was done, not only at the solicitation of plaintiff in error, but with the express understanding that no part of the consideration should be paid to the bankrupt, but that Waters-Clark Lumber Company should pay the claims held by the bank. (p. 233 record.)

Counsel for plaintiff in error seem to admit that it received a preference, but insist that the preference consisted of notes and moneys, and not logs and lumber, and for this reason ask this court to reverse the decision of the state court; but section 60b of the bankruptcy act provides that the trustee may recover the actual property transferred or its value. In this case, before the trial of the action, plaintiff in error had foreclosed its mortgage, by directing the bankrupt as mortgagor, to execute bills of sale of the mortgaged and other property to the Waters-Clark Lumber Company, under an arrangement by which the Waters-Clark Lumber Company would pay off the claims the bank and others held against the logs and apply any excess to the general indebtedness of the bank. This was a mere means of foreclosure. The notes given simply measured the portion of the value of the property which was deemed to be in excess of the labor liens, and which were turned over to the bank. The complaint alleged that the Waters-Clark Lumber Company disposed of the property and paid the proceeds to plaintiff in error, and judgment has followed this allegation. True, defendant in error in the state court prayed judgment for a much larger sum, namely, the value of the property, regardless of the amount actually received by the bank, and insisted that to be the true measure of damage to the trust estate. The fact that the state court adopted a different measure of damages, and one more favorable to plaintiff in error, is now urged as a reason why this court should reverse the judgment of the state court.

THIRD, *That is was error to instruct the jury that creditors were all of the same class.* (See pp. 37 and 38 defendant in error's brief.)

FOURTH, *That the state supreme court erred in its construction of the word "preference."*

It is argued that because the preference received by the bank amounted to only 26½ per cent of its claim, that in determining whether this preference did or did not constitute a preference, the unpaid 73½ per cent of the bank's claim should be treated as paid, and investigation made to determine as to whether the remaining unsecured indebtedness, amounting to $7,406.90 (as stated by counsel, brief, p. 33), would be reduced an equal amount out of the proceeds of the bankrupt's remaining property. Why the remainder of the bank's claim should be eliminated, is not stated, except that the bank having received a preference, it would not be permitted to pro rate with the other creditors. This assumes in advance that the payment of 26½ per cent constituted a preference; for otherwise, the bank could file a claim for the remaining 73½ per cent of its indebtedness. But the value of the remaining property of the brankrupt was shown on the trial to be practically nothing. The accounts receivable stated by counsel to be of the value of $4,000 were shown to be practically worthless. (pp. 110-111 record.) The wagon, sleighs and camp outfits stated by counsel to be worth $2,000 were sold by the trustee for less than $300. The $1,500 in lath and shingles never existed, nor did the $2,000 in cash. It is sufficient to say that the record discloses a hopeless conflict in the evidence, as to the value of the property owned by the bankrupt after the transfers in question, but it is undisputed that it consisted of property useful only for saw mill purposes, and that bankrupt's mill had burned, so that he had no use for such property.

SIXTH, *That the trustee represents creditors who are entitled to participation in the distribution of the bankrupt estate, and no recovery can be had except for their benefit.*

The complaint is criticised because it did not allege that any claims had been filed in the bankruptcy court, and it is urged that the demurrer to the complaint should have been sustained for this reason. The complaint alleges: "That there is no other property in the possession of plaintiff as such trustee, or belonging to the said John H. Young, out of

which the other creditors of said Young could be paid, and that it is necessary to enable plaintiff to pay anything to the other creditors, to recover from said defendant the value of the property so by it appropriated by means of said transfers." (12 record.)

It is further urged that the recovery in actions of this character must be limited to an amount sufficient to pay the creditors whose claims were proven and entitled to be proven in the bankruptcy court, but section 60b of the bankruptcy act, 1898, provides the measure of recovery, leaving it for the bankruptcy court to determine what creditors are entitled to participate and in what amounts. This assignment was not discussed in the opinion of the Supreme Court, and appears in this record only by the certificate of the Chief Justice (p. 315), and such certificate is only to the effect that such questions were considered, and not that they were material or necessarily involved in the decision.

In conclusion it is respectfully submitted that the writ of error should be dismissed; or if this court shall be of opinion that it has jurisdiction to review the judgment appealed from, then that such judgment should be affirmed.

Respectfully submitted,

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